Feb. 6. 1770.

ANSWERS

FOR

DONALD M'ILMUN late of the Iſland of Jamaica, now Merchant in Glaſgow;

TO

The PETITION of Meſſ. MANSFIELD, HUNTER, and COMPANY, Merchants in Edinburgh.

THE reſpondent, of this date, accepted a bill for *L.* 708 : 8 : 2 Sterling to Ebenezer M'Culloch and Company, payable 14 months after date at their warehouſe in Edinburgh. Nov. 15. 1768.

This bill was indorſed by M'Culloch and Company to Meſſ. Anderſon and Davidſon merchants in London, and by them again to the petitioners.

In the beginning of December laſt, M'Culloch and Company, the drawers of the bill, became bankrupt; and immediately thereafter, arreſtments were uſed in the hands of the reſpondent to the extent of above *L.* 10,000 Sterling.

When the term of payment of the bill came, it was preſented to the reſpondent for payment, who refuſed it on account of the arreſtments uſed in his hands, upon which it was proteſted for non-payment againſt all concerned. Jan. 18. 1770.

Upon this the reſpondent raiſed a multiple-poinding, and alſo preſented a bill of ſuſpenſion, ſetting forth his double diſtreſs, by reaſon of the arreſtments produced: That he had raiſed a multiple-poinding, which would call in a week; and therefore contending that payment ſhould be ſuſpended for the few days neceſſary to bring that action into Court; becauſe, though the indorſees would no doubt be preferable if the indorſations were acquired in the courſe of trade for ready money, yet he the ſuſpender had no occaſion to Jan. 20. 1770.

know any thing of the cauſe of granting the indorſations ; and it might be alledged, and for ought he knew proved by the arreſters, that the indorſations were in truſt for behoof of the bankrupts, or within 60 days of their nottour bankruptcy in ſecurity of former debts, in which caſes the indorſations would be reducible, and the arreſters preferable ; and therefore payment ſhould be ſuſpended for a few days, that the arreſters might have an opportunity of being heard, and that the ſuſpender might pay with abſolute ſafety. The ſuſpender at the ſame time ſet forth, That he was willing to find ſufficient caution, or to conſign the money (in caſe that was more agreeable to the chargers) in their own hand, or that of any other perſon the Court ſhould appoint.

The petitioners gave in anſwers to this bill of ſuſpenſion, bearing, That they were willing to depone that they had paid full value for the indorſation, in the way of trade ; and that their oath ought to be taken, and the bill of ſuſpenſion refuſed.

Jan. 25. 1770. The Lord Hailes Ordinary, after adviſing with the whole Lords, paſſed the bill of ſuſpenſion upon caution.

The reſpondent, who had no inclination to keep the money, and who was deſirous to put the petitioners to as little inconvenience as was conſiſtent with his own ſafety, paid in the money to the petitioners, upon their bills taken in name of his agent. This notwithſtanding, and notwithſtanding that the petitioners might, if their alledgeance be true, have had in a few days a judgment in their favours in the multiple-poinding, which is now called ; yet they have thought proper to reclaim againſt the judgment paſſing the bill upon caution ; and in conſequence of appointment theſe anſwers are ſubmitted to their petition.

All the intereſt the reſpondent has in this matter is, that he pay ſafely, that is, without being liable to pay over again to the arreſters in caſe they bring an action of forthcoming againſt him, and without being liable to defend himſelf againſt ſuch proceſs at his own expence, which muſt be the caſe if the ſum in diſpute be withdrawn out of his hands.

The reſpondent therefore ſhall not object to the competency of this petition, which however ſeems to be very doubtful. The reſpondent knows, that ſuch, petitions have been ſometimes admitted at the cloſe of a ſeſſion, when there was not time to get the reaſons of ſuſpenſion diſcuſſed upon the bill, and where the matter was *moræ impatiens*, *e. g.* when a bill was paſſed ſtopping a building, or the like; but it is very ſingular and uncommon to reclaim to the whole Lords by petition againſt an interlocutor of an Ordinary paſſing

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a bill upon report in the middle of a ſeſſion, when there is abundance of time to get the reaſons diſcuſſed upon the bill, which is the caſe at preſent, as the multiple-ponding has come in: And the fact is, that the petitioners, if they really paid value, as they ſay, might have got a preference in the multiple-ponding for very little more expence than this petition muſt coſt them. However this point the reſpondent leaves with the Court.

The petitioners ſay, That it has been long very well underſtood, that bills are like ſo many bags of money, which paſs from hand to hand, unclogged and unattachable by the creditors of the drawer or of the intermediate indorſees.

There is no doubt of this principle, and it will have the effect to prefer the petitioners (if they have paid value, as they alledge) to any perſon founding upon a diſcharge, backbond, or other writing not appearing *ex facie* of the bill, or to the creditors arreſters, unleſs they eſtabliſh that the indorſations were in truſt or ſecurity, as above mentioned. But it has not the leaſt tendency to prove, that this bill of ſuſpenſion ſhould be refuſed ſlap-daſh, without giving the ſuſpender an opportunity of bringing the arreſting creditors into the field, that he may pay ſafely, and that they may be heard upon their intereſts.

The petitioners ſay they are informed, that in our neighbouring country of England there is ſcarce a report to be found of the judgment of a court of law upon a queſtion reſpecting the attachment of an indorſed bill.

The reſpondent believes it may be true, that there is no report to be found in the Engliſh law-books upon the attachment of a bill by arreſtments, becauſe ſuch a diligence as arreſtment is, it is believed, unknown to the law of England: But that law is come to too great a degree of maturity not to have a remedy in ſuch caſes, and that is, by an injunction from the Court of Chancery. This the petitioners know very well, and they experience it at this moment in the caſe of a bill drawn upon the French Eaſt-India Company, which was indorſed to them in Auguſt laſt.

The caſe there was, That John Graham in the Eaſt-Indies purchaſed a bill from the French Eaſt-India Company, at Chandernagoe in the Eaſt-Indies, upon the French Eaſt-India Company at Paris, for *L.* 1040 Sterling, payable in London to his father, John Graham of this city, which bill was accepted by the Eaſt-India Company's agents in London. This bill Mr Graham ſenior put into the hands of Thomas Hogg, with whom he had a caſh-accompt; and Mr Hogg gave him a letter, acknowledging the bill to have been put into his hands

hands to be negotiated. And afterwards he wrote him another letter, bearing, that he had preſented the bill, and that it had been accepted, and obliging himſelf to place it to his credit when paid, which it would not be for ſeven months.

This bill Mr Hogg indorſed to the petitioners two or three weeks before his bankruptcy, and, as Mr Graham ſays, in ſecurity of a former debt due by him to them ; and they ſent it off to their correſpondent in London, to get payment when it fell due. Upon Mr Hogg's bankruptcy, Mr Graham inſiſted that, upon paying up what he owed upon his caſh-accompt, he ſhould have back the bill, which greatly exceeded what he owed upon his caſh-accompt, as that bill had been only lodged with Mr Hogg as a pledge or ſecurity.

But this having been refuſed, he inſiſted before this Court againſt the petitioners in an action of reduction of the indorſation, upon the act 1696 ; and at the ſame time payment of the bill at London was ſtopped by an injunction from the Court of Chancery, ſo that it is at preſent the ſubject of litigation in both countries. This caſe the reſpondent mentions, in order to ſhow that the petitioners are miſtaken as to their ideas of the law of England, and that it is by no means a thing impoſſible, or unimaginable, that dealers in bills ſhould take an indorſation to a bill of exchange in ſecurity of a former debt.

The whole argument of the petitioners proceeds upon an alledged hardſhip or inconvenience to the dealers in bills; and this they carPetition, p. 6. ry ſo far, as even to take ſome offence at the neceſſity of making oath as to the onerоſity of an indorſation, becauſe it is attended with ſome ſmall expence. However, this, they ſay, has been *hitherto* ſubmitted to: But they ſtrenuouſly contend that a bill of ſuſpenſion ought not to be paſſed, in order to make room for a multiple-poinding, and an inquiry whether the holder of the bill be or be not an onerous indorſee ; becauſe, if ſo, the holder of the bill may be involved in a lawſuit, which would put the holder to more expence than his ſmall profit on the diſcompting can afford ; the conſequence of which, they ſay, will be, that nobody will diſcompt bills.

If the petitioners be right in their argument, that the profits upon the diſcompting of bills are ſacred, and not to be in the leaſt impaired even by ſuch an accident as a bankruptcy, the conſequence of it is, that even the check of an oath as to the onerоſity of indorſations ought to be taken off, becauſe even that cannot be given without incurring ſome ſmall expence: And it is not improbable, if your Lordſhips grant the deſire of this petition, the next demand will be, that you ſhould refuſe ſuch bills of ſuſpenſion, without requiring the

the charger to make oath to the onerosity, because of the expence attending even that step, which the small profits of discompting cannot, it will be said, afford. And indeed the petitioners gives your Lordships a pretty broad hint to that purpose: For they set forth, that that expence has been *hitherto* submitted to; plainly indicating, that they are now grumbling at the small expence of making oath to the onerosity; and that, if they prevail in this question, they will very soon bring the other to trial.

But the respondent apprehends, that if your Lordships were to grant either the one or the other demand, it would open a door to the most enormous frauds and perjuries. The petitioners are gentlemen of undoubted credit and character; but that will not always be the case of every holder of a bill. Experience proves the contrary but too often happens, and that numberless frauds have been committed by bankrupts, and their confidents, through the medium of such indorsations. The petition sets forth, That it is nor preferred on account of this particular case, but in order to establish a precedent that will benefit all holders of bills, so that no doubt this is a very general question. If either the requisite of an oath to the onerosity should be dispensed with, or even the making oath alone should suffice to prevent all possibility of investigation or inquiry into the question, whether the indorsation was granted in trust or in security of a former debt, it is evident that a door would be opened to the grossest frauds and perjuries: For of all the methods of fraud practised by bankrupts, none is more common or more easy than that of indorsing away bills. The real interest of trade, therefore, is by no means with the petitioners. The real interest of trade is, That the frauds of bankrupts should be prevented, and consequently that there should be room for an inquiry into the onerosity of indorsations. Nor can this ever put the onerous indorsee to any considerable delay or expence: For a multiple-poinding is a privileged summons, that comes into Court in six days; and the onerous indorsee is so far guarded by the law, that a challenge against the indorsation cannot be proved but by writ or oath. So that it is clear the indorsee, if onerous, must in a very little time, and with a very little expence, recover his money; and the risk of incurring such a trifling delay and expence, in case of the accident of a bankruptcy, ought to be no reason for refusing to discompt bills, and it will have no such effect.

However, the respondent has not much concern with this argument, however proper it may be for the consideration of your Lordships. His concern is, that he pay safely, and that he pay without

being put to the expence of defending himſelf againſt the arreſters in a forthcoming.

Suppoſe your Lordſhips ſhould grant the deſire of the petition, and refuſe the bill of ſuſpenſion; and that, after this, the creditors arreſters ſhould inſiſt in a multiple-poinding, or an action of forthcoming; and prove *ſcripto* that the indorſation in queſtion was in truſt, or in ſecurity of a former debt, reducible upon the act 1696; and that by this time the petitioners had failed, ſo as that the money could not be drawn back from them: This, though not probably, yet poſſibly may happen in this caſe; and there can be no doubt it will very often happen with ſome holders of bills, if the precedent the petitioners want be eſtabliſhed. Now, what would your Lordſhips ſay to ſuch a caſe? Your Lordſhips ſurely would not ordain the reſpondent to pay over again, as he had paid *auctore prætore*, after raiſing a bill of ſuſpenſion, and offering and endeavouring to bring all parties intereſted into the field. If he would not be obliged to pay over again, what could be ſaid to the creditors arreſters who had been cut out of their money unheard? The reſpondent cannot figure any tolerable colour that could be given to ſuch procedure; and therefore it is extremely clear, that there is not the leaſt plauſibility in the demand made in the petition, unleſs the petitioners had at the ſame time offered to find caution to make the ſum in queſtion forthcoming, in caſe the creditors arreſters ſhould inſiſt in the multiple-poinding, or in a proceſs of forthcoming againſt the reſpondent.

Even this however would not be quite ſufficient, for the petitioners, ought, in order to make their demand plauſible, to offer to find caution to defend the reſpondent againſt any proceſs of forthcoming that may be brought againſt him, or reimburſe him of what expence he may lay out in ſuch defence; the expence of appearing in ſuch proceſs, is, it ſeems, an object not unworthy the attention of the petitioners, and therefore it ſhould not be below the reſpondent's notice. If the reſpondent be allowed to conſign the money, or retain it till the diſpute is ended upon a multiple-poinding, he will either be put to no expence, or if he is put to expence, he will be reimburſed of it out of the fund in his hands; but if the fund be taken out of his hands, and the arreſters inſiſt in a forthcoming againſt him, it is evident that he may be put to a conſiderable expence in litigation, without any relief. Now, why ſhould the reſpondent, who is the accepter of the bill be ſubjected to the riſk of incurring ſuch expence, while the petitioners, who are the diſcompters of the bill, are exeemed from any ſuch riſk? In ſuch a caſe, it is plain,

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that *potior eſt conditio poſſidentis*; and therefore the petitioners, in order to make their demand plauſible, ſhould not only find caution to make the ſum forthcoming to the arreſters in caſe they inſiſt, but likewiſe to defend the reſpondent againſt any proceſs brought at the inſtance of the arreſters, or to reimburſe him of what expence he may incur in carrying on ſuch defence.

The petitioners are pleaſed to argue, That no reaſons of ſuſpenſion can be regarded unleſs ſuch as are inſtantly verified. Though practice has a good deal relaxed in that particular, yet there is great reaſon, they ſay, in ſuch a caſe as the preſent, for adhering to the general rule, and that therefore the bill ought to be refuſed upon their making oath to the oneroſity of the indorſation. The petitioners likewiſe admit, that it is competent to inſiſt for their oath, as to the oneroſity of the indorſation; and that if a relevant challenge of the indorſation could be proved by writ, they would have no objection to the paſſing of the bill; but that it ought not to be paſſed upon a random allegation, that it is poſſible the arreſters may prove ſuch challenge, in the courſe of diſcuſſing the ſuſpenſion. They ſay that no material injuſtice can be done to the arreſting creditors, becauſe the oath emitted by the petitioners being only taken *ex officio*, and not upon the reference of a party intereſted, it will not conclude the arreſters, to whom it will ſtill be competent to prove *habili modo*, that the indorſation was in truſt or ſecurity; and that if the arreſters do prove this, they will recover the ſum in queſtion from the petitioners *cum omni cauſa*.

But, with ſubmiſſion, all this is nothing to the purpoſe. It is notorious, that in our preſent practice, it is not requiſite that reaſons of ſuſpenſion be inſtantly verified. It is notorious that in caſes ſuch as the preſent, bills of ſuſpenſion upon multiple-poindings have been paſſed times without number; and indeed this is become ſo much the common law and practice of the country, that it is ſubmitted whether your Lordſhips can alter it, if you were inclinable ſo to do: A ſtatute ſeems to be neceſſary for that purpoſe.

However, be this as it may, the reſpondent's reaſon of ſuſpenſion is inſtantly verified; for his reaſon of ſuſpenſion is *double diſtreſs*, and that he inſtantly verifies by production of arreſtments to an immenſe extent. It neither is nor can be his reaſon of ſuſpenſion that the indorſation is in truſt or ſecurity, for that is no concern of his, and it would be *jus tertii* in him to propone it; for he muſt pay his bill, and it is all one to whom if he pay ſafely.

But as this indorſation may be in truſt or ſecurity, and as that circumſtance, if proved, will prefer the creditors arreſters, it would

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be extremely unjuſt not to give them an opportunity of being heard upon ſuch grounds, in caſe they be founded. If they be not founded, the petitioners will meet with no trouble on that head ; or, if the arreſters do give them unneceſſary trouble, and make ſuch alledgeances without any *probabilis cauſa*, they will be ſubjected to the expence of the petitioners. A creditor, no doubt, as the petitioners juſtly ſay, may lay on an arreſtment in the hands of thoſe that are debtors to his debtor, without incurring expences to any perſon: But if ſuch creditor, in conſequence of theſe arreſtments, ſhall maintain a groundleſs litigation, and particularly give unneceſſary trouble to an onerous indorſee, there can be no doubt that he will and ought to be decreed to pay coſts ; ſo that the apprehenſions the petitioners ſay they are under on account of the expence they may incur by diſcuſſing the ſuſpenſion, are altogether affected.

As to what is ſaid, that the arreſters, in caſe they prevail, will recover from the petitioners the ſum in queſtion *cum omni cauſa*, and conſequently that no prejudice can ariſe to any perſon concerned from the refuſal of the bill.

The anſwer is by no means ſufficient ; for what if the arreſters prevail, and the petitioners be bankrupt and unable to repeat the money by that time ? This is no doubt a very improbable ſuppoſition in the preſent caſe, becauſe of the opulent circumſtances of the petitioners: But it moſt certainly will very often happen to be the caſe with other holders of bills, and that is enough for the reſpondent's purpoſe. For the petitioners do not lay their argument upon their own particular circumſtances: They lay it upon a general principle, and the declared intention of the petition is to obtain a deciſion that will benefit all ſorts of holders of bills. In ſhort, it is evident, that in order to give their demand any degree of plauſibility, the petitioners ſhould have offered to find caution to make the ſum forthcoming to the arreſters in caſe they prevail, as alſo to defend the reſpondent againſt any proceſs the arreſters may bring againſt him for the money in queſtion, or to reimburſe him of what expence he may lay out in the courſe of ſuch defence. But as no ſuch caution is offered, the demand of the petitioners is, with ſubmiſſion, altogether whimſical and incompetent.

In reſpect whereof, &c.

JO. MACLAURIN.

Ep. Cands.
3/17/02